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Receipts, records and class actions

By Jennifer Ratner, Amy Lally and Geoffrey Kehlmann

"Would you like your receipt?" Most of us quickly dismiss that question in our everyday lives, but consumer class action lawyers have given it extra thought ever since the 3rd U.S. Circuit Court of Appeals issued its game-changing decision in *Carrera v. Bayer Corp.*,12-2621.

In August 2013, the 3rd Circuit decertified a class of Florida consumers who claimed that Bayer falsely advertised the benefits of its One-A-Day WeightSmart supplement. In vacating the district court's certification order, the court focused on "ascertainability," a fundamental requirement for class certification. Now, the 9th U.S. Circuit Court of Appeals appears poised to address the issue of ascertainability in a similar small-dollar consumer class action.

To satisfy the ascertainability requirement, a plaintiff must define a class with objective criteria so it is administratively feasible to determine whether a particular individual is a member. In *Carrera*, the 3rd Circuit ruled that the plaintiff did not make a sufficient showing of ascertainability because he did not present a reliable method of determining who was a member of the class. Bayer had no list of individual purchasers of WeightSmart because it only sold the product to retailers. Plus, individual purchasers were unlikely to have documentary proof of purchase because people rarely save small-dollar receipts or packaging. The plaintiff had to find some other way to identify class members.

Without packaging, receipts or sales records, the plaintiff sought to rely on affidavits from proposed class members, who each claimed that he or she bought the product, to assuage the court's ascertainability concerns. The 3rd Circuit was unpersuaded and ruled that the proposed affidavits would not suffice. The court explained that accepting the attestations of proposed class members with no independent indicia of reliability would infringe upon a defendant's due process right to challenge the proof used to demonstrate class membership. The court ultimately afforded the plaintiff the opportunity to submit a screening model with proof as to its reliability and how it would allow Bayer to challenge the affidavits. The plaintiff did not appear do so. A motion for final settlement approval is pending.

Many now wonder whether *Carrera* sounds the death knell of small-dollar consumer class actions. The class action bar has carefully monitored key jurisdictions to see whether they will follow the 3rd Circuit, and if so, how rigorously they will analyze, and what standards they will apply to, whether or not the putative class reliably may be ascertained.

Federal district courts in California — a state widely considered to be the capital of consumer class actions — have weighed in on *Carrera*, and the approach has been varied.

In *McCrary v. Elations Co. LLC*, 13-00242 (C.D. Cal. Jan. 13, 2014), Judge Jesus G. Bernal stated of *Carrera*, "While this may now be the law in the Third Circuit, it is not currently the law in the Ninth Circuit." Bernal explained that in the 9th Circuit, "it is enough that the class definition describes a set of common characteristics sufficient to allow a plaintiff to identify himself or herself as having a right to recover based on the description."

In *Lilly v. Jamba Juice Co.*, 13-02998 (N.D. Cal. Sept. 18, 2014), Judge Jon S. Tigar quoted Bernal and noted that the logical consequence of *Carrera* is that in any case in which the consumer does not have a record of purchase and the seller does not keep a record of buyers, class certification is prohibited, which he suggested would be contrary to the purpose of the class action device to redress small individual injuries that cumulatively are substantial.

Other district courts in California have relied on the reasoning in *Carrera* to deny certification.

In *Sethavanish v. ZonePerfect Nutrition Co.*, 12-2907 (N.D. Cal. Feb. 13, 2014), Judge Samuel Conti found *Carrera* persuasive and denied class certification where the defendant sold the product at issue almost exclusively to retailers and where records only identified a small fraction of consumers who purchased the product. Then, in *In re Clorox Consumer Litig.*, 12-00280 (N.D. Cal. July 28, 2014), Conti again denied class certification of five proposed sub-classes of consumers who bought a cat litter product, holding, "Affidavits from consumers alone are insufficient to identify members of the class."

Another ruling from the Northern District of California now presents an opportunity for the 9th Circuit to clarify the ascertainability standard. In *Jones v. Conagra Foods Inc.*, 12-01633 (N.D. Cal. June 13, 2014), Judge Charles Breyer denied certification of a proposed class of consumers of a Hunt's canned tomato product bearing a certain, allegedly misleading label. Breyer ruled that the class was not ascertainable and explained why sworn affidavits from proposed class members would not suffice. He stressed that the product labeling had varied over the years such that some labels contained the challenged language while others did not. Thus, it would be "hard to imagine" that proposed class members could remember which products they purchased and whether those products bore the allegedly misleading labels.

Breyer did not go so far as to say that lack of receipts or sales records would doom all small-dollar consumer class actions, though. "Although this Court might be persuaded that a class of 'all people who bought Twinkies,' for example, during a certain period, could be ascertained — one would at least have more confidence in class members' ability to accurately self-identify — the variation in the Hunt's products and labels makes self-identification here unfeasible."

The plaintiff's appeal from the order denying certification in *Conagra Foods* is pending before the 9th Circuit (14-16327) and has been fully briefed. The issues on appeal include ascertainability, as well as other aspects of the district court's certification ruling. The 9th Circuit therefore stands poised to weigh in on the ascertainability debate that has swelled since *Carrera*.

Should ascertainability present a low hurdle for small-dollar class action plaintiffs or should courts be more demanding as to the reliability of proposed class members' "say-so"? If the 9th Circuit ultimately answers this question, you can bet that, unlike their grocery receipts, class action lawyers will be sure to save a copy of the court's opinion.

Jennifer Ratner *and* **Amy Lally** *are partners and* **Geoffrey Kehlmann** *is an associate in Sidley Austin LLP's Los Angeles office. The views expressed in this article are exclusively those of the authors.*